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Supreme Court of the United States

October Term, 1958

No. 428

ERICH W. BERENDSON,

Petitioner,

against

REDERIAKTIEBOLAGET VOLO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SHAFTER & SHAFTER,
Proctors for Petitioner.

JACOB RASSNER,
of Counsel.

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Opinions Below

The memorandum opinion of the United States District Court for the Southern District of New York, dated October 26, 1956, is reported at 149 Fed. Supp. 140.

The opinion of the Court of Appeals for the Second Circuit in this case (Appendix, pp. 23-26) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. A question left open in the case of *Lauritzen* v. *Larsen*, 345 U. S. 571—whether the United States statutes

are such laws, including the provisions of the Jones Act (46 U. S. C. Sec. 688), as are available to a permanent alien resident of the United States.

2. Has the United States Court of Appeals for the Second Circuit or the United States Court of Appeals for the Fourth Circuit (which are in conflict), correctly interpreted the law which sets forth the basic facts determining whether a Federal District Court of the United States should retain or reject jurisdiction in an action by an alien seaman against a foreign shipowner.

3. Whether the theoretical, ephemeral existence of a remedy, not so in fact, is adequate support for a denial of access to our Federal Courts to alien seamen. In other words, does the mere assertion by a shipowner that a seaman has available the right to file a claim before a non-judicial foreign official, constitute the justification for an abdication by our courts of their primary duty to enforce justice between parties regardless of nationality.

4. Are seamen injured aboard vessels, not of their common nationality, obligated to have their rights adjudicated by a non-judicial agency of the common nationality of the shipowner, alien to and often hostile to the injured seaman and his nationality.

5. Is the burden of proof on a seaman to establish the hostility of the agency, selected by the shipowner, to determine the seaman's rights, or does the shipowner have the burden of establishing the fact that such agency is (1) competent; (2) available; (3) impartial, or must a seaman accept such agency regardless of how hostile, inadequate, unfair, unjust and prejudiced as such agency has been found to be. Who has the burden of proof of establishing the facts upon which jurisdiction is based, the seaman or the shipowner?

Reasons for Granting the Writ

1. The United States Supreme Court, in its decision in the case of *Lauritzen* v. *Larsen*, 345 U. S. 571, left open the question now raised in the case at bar—as to the applicability of American statutory law and its availability to a permanent alien resident of the United States.

2. The United States Court of Appeals for the Second Circuit in the case at bar has held that a district court did not abuse its discretion in rejecting jurisdiction under similar facts wherein the United States Court of Appeals for the Fourth Circuit, in *The Fletero* v. *Arias*, 206 F. 2d 267, decided as a matter of law that jurisdiction is to be retained.

3. There has been an unconscionable denial of justice to a seaman by, in fact, denying him an adequate remedy on the basis of a self serving and unproven assertion by a shipowner that such seaman could get adequate relief in a non-judicial agency of the shipowner's choice and nationality alien and foreign to the seaman. The uniform and traditional attitude of our form of Government to give to all litigants an opportunity to obtain justice in our courts has been totally disregarded and availability of our courts has been denied to these seamen, leaving them totally without any remedy in fact.

4. Common sense, reason and logic is repugnant to the suggestion that an alien seaman filing claim against a shipowner, with an agency of the shipowner's choice and nationality, alien and often hostile to the seaman, would receive the same impartial justice as he would receive in a neutral court, such as in a United States Federal Court.

5. The self serving declaration by a shipowner, without any proof and contrary to common knowledge; "that a seaman has available some remedy", should not be con-

sidered as a sound or adequate basis for denying justice to a seaman injured in international commerce on vessels trading with the United States. This is particularly so when the shipowner does not show by any affidavit or other proof that such alleged remedy is impartial, convenient or adequate for the administration of impartial justice. Common knowledge and experience have demonstrated the hostility, prejudice and injustice resulting from claims presented to such non-judicial agency and is not a fair tribunal for an alien seaman to obtain justice. The unconscionable favoritism that a shipowner would receive at the hands of an agency of its own nationality selected by said shipowner, is not conducive to an impartial administration of justice and uniformity of admiralty law. The burden of proving that such agency would mete out justice rightfully is the shipowner's burden. That the burden to prove the contrary should not be shifted to the shoulders of the seaman, who often, if not always, is in a position where legal proof of prejudice, bias and favoritism is not available to him, in spite of it being so factually.

Statement

The petitioner is a seaman, forcibly displaced through the annexation of his place of birth, Estonia, by the Soviet Government. Since that time, he has had no home other than the United States. He is a displaced person in the true sense of the word, as he has refused to return behind the Iron Curtain, having rejected a Russian passport or documentation, and he cannot obtain any other.

If the United States Courts are not open to him, he will not be able to obtain redress for his permanently crippled condition, suffered aboard a foreign flag ship under American Charter.

The District Court of the Southern District of New York rejected jurisdiction stating that he had other means of redress, to wit, a non-judicial agency of the Swedish Government.

The agency was challenged by petitioner as being biased, prejudiced and hostile to petitioner, as demonstrated by its conduct from the time of his injuries up to the time of the shipowner's motion to reject jurisdiction.

The petitioner was a seaman of Estonian birth.

He left Estonia in 1938. In 1940, the vessel on which petitioner was working was torpedoed and he was taken to England. About said time, Estonia was annexed by Russia. Berendson was directed to report to the Soviet Embassy at London to obtain a Soviet passport, as he only had an Estonian passport. This Berendson refused to do, which refusal resulted in his passport being declared invalid by the Soviet officials. Obviously, this rendered Berendson in the category of a "displaced person".

Berendson sailed on British vessels during World War II and arrived in the United States in 1946. Since 1946, Berenson obtained all his employment in the United States, signing on various vessels in various ports of the United States.

Berendson's only residence since 1946 has been the United States of America.

His residence during the entire period has been the Estonian Club in New York City until two years ago when he moved to 951 Washington Avenue, Bronx, New York. He has no relationship or national interest in Sweden by way of citizenship, residence, family, or inclination. He can not enter Sweden since his Estonian passport is not recognized by the Swedish Government. He can never return to Estonia since that country no longer exists. Thus—the United States was and is the sole forum accessible to the petitioner.

Unless the petitioner can obtain relief in the United States, he will be irretrievably shorn of his cause of action and without remedy against the shipowner for the injuries sustained.

Berendson signed aboard the M/S DALHEM, owned by the shipowner in Houston, Texas on October 20, 1952. The voyage was to terminate in a United States port.

On March 26, 1953, when working in the #4 hold, he was ordered by the Chief Mate to sweep the #3 hold. He walked along the 'tween deck, which was not provided with any light and slipped on dunnage thrown in the passage, all of which rendered the vessel unseaworthy and the shipowner guilty of negligence. Falling 20 feet to the lower deck of the #4 hold, he fractured his sacrum, his 9th and 10th dorsal vertebrae, his pelvis and sustained an injury to the groin area which hindered his waste elimination process.

At the time of the accident the ship was under charter to North Atlantic & Gulf Steamship Company, a New York corporation, with offices at 120 Wall Street, New York City.

The vessel was off the coast of Cuba. Berendson was taken off the ship and hospitalized in Havana, Cuba until June 24, 1953. During that time, he was never visited by any Swedish Consulate official nor did he receive any communication from its offices. In fact, the petitioner, when he telephoned the Consulate on June 22, was informed that the Consulate did not even know that he was hospitalized. Two days later Berendson was compelled under Cuban armed guard to rejoin the DALHEM (which had again arrived in Havana). He was unfit for duty at that time.

The vessel reached Sweden. The petitioner lived and was treated aboard the ship for the one month that it was in Swedish waters. He had discussed his Estonian passport situation with Swedish officials and was informed that the passport could not be recognized, that he could not enter the country. Learning that the ship was to return to the United States and with that understanding, Berendson re-signed for the voyage.

When the vessel reached Port Talbot, South Wales, he was informed that the ship would not touch the United

States and desiring to return here, left the ship without authorization. He was imprisoned for two months by British authorities and was then granted a six month stay.

He signed aboard the M/T Poxtos, suffered an aggravation of his injuries, signed off the vessel in the British West Indies and returned by ship to the United States on October 17, 1955.

On January 27, 1956 he filed the instant libel.

The shipowner entered its appearance and moved the Court to decline to retain jurisdiction.

On November 7, 1956, District Judge Sylvester J. Ryan caused a decree to be entered dismissing the libel, with prejudice, without any consideration to the principles of General Maritime law, in an unreported memorandum decision in which Judge Ryan held the Jones Act not applicable, with no mention of General Maritime law being or not being applicable.

A timely notice of appeal was filed on December 13, 1956. On July 11, 1958, the United States Court of Appeals for the Second Circuit, before Swan, Hincks and Moore, Circuit Judges, affirmed the judgment of the Court below.

POINT I

The holding in the case of *Lauritzen* v. *Larsen*, *supra*, is not controlling on the facts presented here.

It is respectfully suggested to this Honorable Court that not only is the question left open in the *Lauritzen* case, *supra*, one which merits consideration by this Court, but that perhaps in view of changing times and circumstances, the entire decision in said case should be reconsidered.

(a) *Lauritzen* v. *Larsen* *supra*, is not controlling herein in view of facts present in this matter, which were absent in the *Larsen* case and which expressly left unanswered the applicability of American statutes based upon those facts.

The *Larsen* case involved the applicability of the Jones Act in a civil suit by a Danish citizen seaman, with residence in Denmark, who, while temporarily in New York, joined a Danish vessel and was injured in Cuban waters.

The shipowner claimed that Danish law was applicable and that Larsen had received all compensation to which he was entitled.

The Supreme Court then discussed the various factors which would enable it to determine the applicability of the United States Statute; Place of the Wrongful Act, Law of the Flag, Allegiance or Domicile of the Injured, Allegiance of the Defendant Shipowner, Place of Contract, Inaccessibility of Foreign Forum, and Law of the Forum.

After declaring that the weight given to the law of the flag overbears most other connecting events in determining applicable law, that it must prevail unless some heavy counterweight appears, the Court (discussing Allegiance or Domicile of the Injured) stated that a conflict of allegiance to the flag and the legitimate interest of each nation that its nationals and permanent inhabitants be not maimed and disabled from self-support was present. The Court then continued that Larsen's home was in Denmark, his presence in New York was transitory and created no national interest or duty by the United States toward him to justify intervention of the law of the United States aboard a Danish vessel.

Thus—the basic issue of the case at bar—the applicability of American statutory law to a permanent inhabitant of the United States was discussed and expressly left unanswered as outside the issues present in the *Larsen* case.

Discussing the accessibility of the foreign forum, the Supreme Court pointed out that the parties stipulated that a claim could be made through the Danish Consulate in New York, that compensation was an exclusive remedy under Danish law, that Larsen had already received all that he was entitled to under that law. Again, the basic controverted issue present in the case at bar was absent in the *Larsen* case.

It would appear that the rejection by the Supreme Court of the applicability of the Jones Act was not predicated upon the facts present in the instant suit. The two factors which the Court determined to be without the issues of *Larsen* and which it implied might call for applicability of American statutory law were the very issues raised in the District Court by the petitioner herein. As such, it is submitted that *Lauritzen* v. *Larsen, supra*, is not determinative of this suit, that the various decisions of this Court, none of which were overruled by the *Larsen* case, *supra*, are controlling of this matter.

Lauritzen v. *Larsen, supra*, is not instructive as to the law that would be applied in the event a seaman did not receive all the benefits that he would be entitled to under the law of the flag of the ship involved, as *Larsen* did, nor in the absence of various stipulations as to the applicable foreign law, absent in the case at bar.

For these reasons, the holding in *Lauritzen* v. *Larsen, supra*, merits reconsideration, not only on the questions therein left unanswered, but also revaluation of the questions decided.

(b) The decisions of this Court call for the applicability of the Jones Act to the case at bar.

Turning then to the decisions of this Court, *The Paula*, 91 F. 2d 1001 was an affirmance of a dismissal of a libel *in rem* and *in personam* by a German seaman against a Danish shipowner and vessel. *The seaman was never a resident* of

the United States and signed articles in Chile. He was injured in a United States port. In declining jurisdiction and dismissing the suit, the District Court relied upon the affidavit of the Danish Consul General stating that the compensation system of Denmark was an *exclusive* remedy. There was no issue of inaccessibility of a forum nor did the seaman have any national interest in the United States. This Court stated that the injury in an American port, without further connection was not sufficient to have American law applied to the case.

Thus—the instant suit is clearly distinguishable from *The Paula*.

Gambera v. *Bergoty*, 132 F. 2d 414, was a libel based upon the Jones Act, *in rem* and *in personam*, for injuries sustained by an Italian seaman aboard a Greek ship. The seaman had lived in the United States for about 20 years and had taken out his first papers for naturalization. The Court stated that since he had been so domiciled, the voyage began and ended in the United States and the injury took place between Trenton and Philadelphia, the libel *in personam* should lie. The Court explained that naturalization was a troublesome process for seamen because of their long absences from the country and the fact that they must procure two witnesses who can swear that they have known them continuously for five years, and declared that it would look behind the actual citizenship status of the seaman to see whether he was actually a member of an American community earning his living side by side with those on behalf of whom the Act was passed.

In the case at bar, Berendson signed on at Houston, Texas for a voyage to terminate in the United States. He has resided and is domiciled in New York City continuously since 1946 with no other domicile anywhere in the world. The sole difference between *Gambera* case, *supra* and *Berendson* is that the former sustained injury in American waters, which this Court in *The Paula* said was not of import.

In *O'Neill* v. *Cunard White Star*, 160 F. 2d 446, the Court assuming jurisdiction of the suit stated that the Jones Act would not lie under circumstance whereby a British subject who signed on in London for a trip to Canada and back was washed overboard on the high seas. The deceased and his wife, British subjects, were domiciled in the United States with their children, American citizens. The Court stated that since both the seaman and the ship were British, British law would apply.

In *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597, the Court reversed a District Court judgment which had dismissed a suit based upon the general maritime law and the Jones Act brought by a Panamanian citizen against a Panamanian corporation for injuries received on the high seas. Taylor signed the articles in the United States.

The District Court dismissed the claim under the general maritime law on the ground that there was no showing of inaccessibility to the Panamanian courts. The Jones Act count was also dismissed.

The Court affirmed the dismissal of the suit under the general maritime law on the ground that there was no abuse of discretion by the District Court. The Jones Act dismissal was reversed on the rationale that the Act extended to all seamen who signed articles in the United States, citing its decision in *Kyriakos* v. *Goulandris, et al.*, 151 F. 2d 132.

It would appear that the principle which guided this Court prior to the *Larsen, supra*, decision was based upon the thought that shipowners who do business in American ports and sign seamen in those ports to man their vessels have the duty to give them the protection of American law.

Though the Supreme Court in *Larsen, supra*, did not consider the place of sign-on to be of sufficient import, the Court, by expressly declining to answer the issue of applicable law to the factor of "Allegiance or Domicile of the

Injured", appeared to reach for the same answer via different route. The petitioner respectfully suggests that those seamen who have a national interest in the United States, who work and live here, pay taxes and become part of the American economy, whether evidenced by years of domicile or residence in the United States or by continuous signing aboard ships in American ports should and do have the protection of the Jones Act.

The petitioner, residing in New York since 1946, having signed on vessels in American ports since that time, and having signed on the DALHEM in Houston, Texas for a voyage to terminate in the United States, it is submitted that there is sufficient national interest to bring the petitioner within the broad purview of statutory law of the United States.

POINT II

The District Court had jurisdiction of this matter.

The shipowner conceded in its memorandum of law at argument of the motion in the District Court, and it is well settled, that the presence of a party or vessel within the jurisdiction endows the Court with control over the suit when service is obtained on said party or vessel. *Ex parte Newman*, 81 U. S. 152; *The Belgenland*, 114 U. S. 355; *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413; *The Falco*, 20 F. 2d 362.

The question involved herein was whether the District Court should have retained the jurisdiction. It is the petitioner's position that the facts presented to the District Court clearly evidenced the necessity to entertain the suit in order to avoid the foreclosure of remedies available to the injured seaman.

POINT III

The District Court abused its discretion by its failure to retain jurisdiction of this cause under the General Maritime Law, on the self serving, unsupported assertion that Berendson could receive justice at the hands of a non-judicial agency selected by the shipowner and of nationality alien to the seaman.

The discretion of the District Court must be exercised with a due regard to the circumstances. The Court should examine the grounds of its decision before the conclusion is accepted and some reason must be shown for the abdication of the District Court's jurisdiction of the matter.

In *The Falco, supra*, this Court laid down the principles of law concerning the respective positions to be taken by the District Court and the Court of Appeals at motions and appeals of the nature involved herein.

> "Moreover, the discretion of the instance court must be exercised with a due regard to the circumstances, and we are required to examine the grounds of its decision, before we accept its conclusion. Courts are primarily established to decide the disputes of all suitors over whom they have jurisdiction, and some reason must be shown for their abdication." (p. 364)

In *O'Neill v. Cunard, supra*, the Court stated that if the District Court's refusal to entertain jurisdiction of the claim would deprive the claimant of his remedy for all practical purposes, it would be an abuse of discretion for the Court to so decline to hear the suit.

In *The Belgenland, supra*, the Supreme Court in discussing the test to be applied by the Appellate Courts in reviewing the District Court's decision, declared:

> "The plaintiffs (appellants) must show that the judge has exercised his discretion on wrong prin-

ciples, or that he has acted so absolutely differently from the view which the Court of Appeal holds, that they are justified in saying he has exercised it wrongly." (p. 368) (Parenthetical matter ours.)

See also: *Motor Distributors v. Olaf Pedersen's Rederi A/S*, 239 F. 2d 403, citing with approval *The Belgenland* as the prevailing law today.

(a) Our courts have consistently held that it is an abuse of discretion to reject jurisdiction when such failure to retain jurisdiction would tend to result in a miscarriage of justice.

Our Courts have consistently held that they will retain jurisdiction in order to prevent a failure of justice, and if the rights of parties would thereby be best promoted.

The Supreme Court discussed the question of retention of jurisdiction in *The Belgenland, supra*, and laid down the following principles of law:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it." (pp. 365-366)
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> * * *
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> "The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better served by declining it." (p. 367)

Thus, the Courts at that time and ever since have been diligent in assuring themselves that refusal to hear and determine a suit will leave the injured seaman with an adequate remedy.

In *Cunard v. Smith*, 255 F. 846, this Court, dismissing on other grounds, affirmed the rule that while an admiralty court of the United States is under no obligation to entertain jurisdiction where all the parties are foreigners, yet it also may entertain jurisdiction of a suit between aliens in civil causes of admiralty and maritime jurisdiction and is inclined to do so when it is necessary to prevent a failure of justice and if the rights of the parties would thereby be best promoted.

Heredia v. Davies, 12 F. 2d 500, cited and quoted with approval the rule of law laid down in the *Smith* case, *supra*.

This Court in *The Falco*, *supra*, again expressed the thought that foreign seamen would not be denied the processes of the Court without the Court first determining that he had adequate remedy elsewhere, that even a Consulate protest would have no effect upon the requirement that justice be promoted.

> "Normally disputes arising out of a seaman's employment are referred to the tribunals of the flag. The Ester (D. C.) 190 F. 216. Nevertheless, courts of admiralty, which are sensitive to a seaman's rights, or at least have always professed to be, will in such cases, before turning him out of court, satisfy themselves that there are no special circumstances which will leave him without adequate remedy. The Becherdass Ambaidass, Fed. Cas. No. 1,203; Wilendson v. Forsoket, Fed. Cas. No. 17,682; The St. Oloff, Fed. Cas. No. 17,357; The Topsy (D. C.) 44 F. 631; The Sirius (D. C.) 47 F. 825; The Ester (D. C.) 190 F. 216. Even the protest of a consul is not conclusive, when justice requires the court to entertain the plea. The Lilian M. Vigus, Fed. Cas. No. 8,346" (pp. 363-364).

In *The Falco, supra,* concerning a Brazilian seaman libelling a Swedish ship for injuries sustained by the alleged unseaworthiness of the vessel, this Court stated that if the seaman had any rights under the law of the sea of such nature that only an American court could have given him a remedy, it would not say that the libel would not lie. Thus —the Court implied that a dismissal of a cause where only an American forum could afford a remedy was an abuse of discretion and reversible error.

See also: *The Fletero* v. *Arias,* 206 F. 2d 267; *O'Neill* v. *Cunard,* 160 F. 2d 446; *Motor* v. *Olaf,* 239 F. 2d 463; *Bernhard* v. *Creene,* 3 Fed. Cas. 279; *Koenigan,* 184 F. 170; *Danielson* v. *Entre,* 22 F. 2d 326; *Canadian Commander,* 43 F. 2d 857; *Barkas* v. *Cia Naviera,* 126 F. Supp. 532; *Cruz* v. *Harkna,* 122 F. Supp. 288, all to the same effect.

(b) The facts presented to the District Court at the motion gave rise to doubt of the fullness or adequacy of the remedy available to the petitioner through the offices of the Swedish Consulate in New York.

The petitioner can not return to Estonia. Nor can he enter Sweden because of lack of a recognized passport. The sole forum open to the petitioner is the United States and the Shipowner conceded this to be so by the absence of any statement in its affidavits that Berendson can or should return to Sweden for relief.

The claim by the Shipowner that the Swedish Consulate affords a complete remedy in New York is without basis in fact. The affidavit of the Consul General stated only that the Consulate had the power to entertain the compensation claim. It was absent of any statement that the Consulate would or could pay an award to Berendson. The affidavit was also absent of any statement that the compensation system to be processed through its offices was an exclusive remedy under the Swedish law but rather averred only that insurance to pay compensation was mandatory upon Swedish shipowners. This was especially noteworthy in view of

the fact that the point was raised in the opposing affidavits and although the Shipowner saw fit to submit a reply affidavit after oral argument of the motion, it still did not assert that there was in fact no other remedy available to Berendson although it was obviously a most crucial issue.

POINT IV

The suggested agency by the shipowner was demonstrated to be a biased, prejudiced and inadequate entity, unconcerned if not actually hostile to petitioner.

The activities and conduct of the Swedish Consulates involved in this matter, the same entity which pleaded the privilege of protection of the petitioner's rights, appears to have lacked the force of conviction necessary to aid Berendson in obtaining any relief.

1. Assuming the master of the DALHEM notified the Swedish Consulate in Cuba of Berendson's injury as he was required to do (paragraph 6 of the Consul General's affidavit), the petitioner, critically injured, was in Cuba for three months, during which time he neither heard from nor was visited by any consulate official until he telephoned the Consulate only two days before he was physically forced to leave Havana under guard to return to the DALHEM. In fact, the coincidence of the Consulate's hearing from Berendson and his forced removal from Havana gives rise to the thought that it was the Consul that caused the petitioner's departure from the Havana hospital, although not fit for duty and in need of further treatment. They knew of his pain, suffering and injuries and were probably responsible for his incarceration in a foreign jail in South Wales when he refused the shipowner's direction that he go to a country other than the United States.

2. The Swedish Consulate in Boston, Mass. knew of the injury since a hearing was held aboard the vessel in Boston Harbor in April, 1953, while Berendson was still hospitalized in Cuba. There has been no showing that the Consulate in Boston took any action on behalf of the petitioner since that time, over five years ago.

3. The Swedish Consulate in New York knew of the injury since 1953 and deliberately and intentionally ignored the petitioner, showed a callous disregard of his rights and did nothing for him and did not even communicate with him, nor suggest that he file a claim or attend any hearing at any time prior to the shipowner's motion to decline jurisdiction. The petitioner has received no award, has not been in communication with any Swedish Consulate, which even gives rise to the question of whether the statute of limitations is now a bar to recovery—even under the compensation process. Petitioner cannot return to his own country because it is behind the "Iron Curtain". His place of remedy is the United States or no place and non existent.

4. Assuming, arguendo, that the Swedish Consulate would do all that it could do, which is just the opposite of what it has done to date, or failed to do, then, in accordance with paragraph 10 of the Consul General's affidavit, payment must still come from Sweden. The question then arises as to whether, as a practical matter, the recommendation of the Consulate is conclusive upon officials in Sweden, also whether Swedish monetary regulations permit or officials are inclined to forward needed American dollars (or currency to be exchanged for dollars) from Sweden to a non-Swedish seaman having no interest in Sweden. That question also raised by the petitioner was never answered.

5. The opposing affidavit of Harvey Goldstein, Esq., stated that an English translation of the Swedish Maritime Code would be submitted to the District Court when re-

ceived, in an effort to determine whether the compensation remedy was indeed exclusive. The decision of the District Court was entered before the translation arrived from Sweden, though it was quite obvious that if that remedy was not exclusive the petitioner would be denied his right of election of remedy by any action of the Consulate.[1]

Without determining any of the foregoing issues and questions raised by the petitioner in opposing the motion, the District Court dismissed the libel.

(c) The District Court was guilty of an abuse of discretion and the Court below was in error when it affirmed the decision of the District Court which had declined its jurisdiction without first assuring itself by any compelling evidence and/or testimony of the rights and remedies of the General Maritime law of Sweden and the true circumstances concerning the availability of all remedies under that law.

In *The Ivaran*, 121 F. 2d 445 the District Court dismissed a case on the authority of *The Paula*, *supra*. The affirmance by the Court of Appeals for the Second Circuit, however, was without prejudice to renewal of the suit in the event that the remedy available to the seaman by presentation of his claim to the Norwegian Consulate in New York should prove to be non-existent. The said Court implied that if, in fact, the Consulate in New York did not have the power or could not procure the relief for the seaman, it would not have affirmed the dismissal of the libel.

Gonzales v. *Dampskslsk*, 108 F. Supp. 908 (S. D. N. Y.) was a libel for personal injuries to a Spanish seaman who had signed articles in Venezuela aboard a Danish vessel. A motion to dismiss the petition and relegate the libelant to an action under the law of Denmark was denied. The Court held that although the respondent contended that

[1] The code was referred to in oral argument on the appeal to the Court below.

the libelant had an adequate remedy under the law of Denmark and indicated in affidavits and a memorandum that the Danish Consulate could process the claim under an exclusive compensation system, a memorandum was no proper showing of the existence of a remedy. The Court stated that it could not conclude that justice would be served by remanding the libelant to rights under Danish law.

In *Radovcic* v. *The Prinz Pavle*, 43 F. Supp. 1013 (S. D. N. Y.) exceptions to the libel on the ground of insufficiency and because the suit was by a Yugoslav seaman against a Yugoslav vessel for injuries sustained on the high seas was overruled. The Court stated that submission by the respondent of an affidavit by the Yugoslav Consul General in New York stating that awards for compensation for injuries sustained by Yugoslav seamen aboard its ships were adjudicated pursuant to Yugoslav law by an arbitration board of the Yugoslav Shipping Commission Committee in New York was clearly insufficient to justify the Court in refusing to entertain jurisdiction of the suit.

Thus, the Court below was in error in affirming the decision of the District Court, which was guilty of an abuse of its discretion in dismissing the libel solely on the basis of an affidavit, not by any recognized authority or expert on Swedish law, especially in view of what amounted to a deliberate refusal to answer the basic question of whether the Swedish compensation remedy was indeed exclusive.

(d) The District Court should have applied the presumption that the law of the flag was the same as the non-statutory law of the forum in absence of evidence to the contrary.

Heredia v. *Davies*, 12 F. 2d 500, was a suit by a Peruvian against a Peruvian ship for injuries sustained while the vessel was docked at New York. The seaman claimed, and the District Court so found, that the vessel was unseaworthy. The respondent asserted that the law of Peru should govern the case. The Court stated that "in the ab-

sence of proof to the contrary, the presumption is that the law of Peru with regard to the right of recovery is the same as the law of this country, the lex fori", citing *The Scotland*, 105 U. S. 24; *Robinson* v. *Detroit*, 73 F. 883; *Minor*, "Conflict of Laws", 532.

In *Bonsalem* v. *Byron*, 50 F. 2d 114, an assault case, the Court of Appeals for the Second Circuit reversed a decree for a French Algerian seaman employed on a British vessel. The assault occurred in Italian territorial waters. The Court held that the rule was to apply the law of the flag, that recovery would not be allowed under unproved foreign law if there would be no recovery under American law. The Court then discussed the basis of liability under *American* law and concluded that there was no liability under that law.

In closing, the Court declared that the presumption that the unproved foreign law was the same as the law of the forum would be permitted if the basis of recovery was sufficiently rudimentary to be the *jus gentium*.

In *The Fletero* v. *Arias*, 206 F. 2d 267, a suit by an Argentinian seaman against an Argentine vessel for injuries incurred in a United States port, the Court declared that the law of the flag would govern, that the general maritime law of Argentina was the same as that of the United States in absence of evidence to the contrary, and applied the principles of the general maritime law of the United States.

In *Robinson* v. *Detroit*, 73 F. 883, a suit between various parties who were on two American ships which collided on the Canadian side of the Detroit River, one of the parties claimed that the Canadian rules of navigation were different from those of the United States in United States waters. The Court held that there was no proof in the record that the United States rules were different from those enforced in Canadian waters and in the absence of such proof, the Court would assume that the rules were the same as the law of the forum.

See also:

The Scotland, 105 U. S. 24;
Jansson v. *Swedish-American*, 185 F. 2d 212;
Cruz v. *Harkins*, 122 F. Supp. 288.

We believe that the interests of justice and uniformity of admiralty law would best be served by adopting the holding in *The Fletero* v. *Arias* case, *supra*, as to the basic facts which should control on the question of whether jurisdiction should be retained or rejected in an action by an alien seaman against a foreign shipowner.

Conclusion

In view of the fact that the Supreme Court of the United States in *Lauritzen* v. *Larsen, supra*, has left an important question open and unanswered, which should be answered at the present time, and in view of the fact that there is a conflict of opinion between the Courts of Appeal for the Second and Fourth Circuits, and in view of the fact that a seriously crippled and injured seaman, having no home but the United States, has been denied access to our American Courts, which is tantamount to a denial of justice which is of grave concern to all alien seamen who are displaced persons and domiciled in the United States, and in view of the fact that the decision in *Lauritzen* v. *Larsen, supra*, needs clarification, it is respectfully urged that these questions merit consideration by this Honorable Court and that the petition for a writ of certiorari should be granted herein.

Respectfully submitted,

SHAFTER & SHAFTER,
Proctors for Petitioner.

JACOB RASSNER,
Of Counsel.

JACOB RASSNER,
On the Brief.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 308—October Term, 1957

(Argued April 7, 1958 Decided July 11, 1958)

Docket No. 24586

ERICH W. BERENDSON,

Libelant-Appellant,

—v.—

REDERIAKTIEBOLAGET VOLO,

Respondent-Appellee.

Before:

SWAN, HINCKS and MOORE,

Circuit Judges.

On appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*. From a decree dismissing the libel "with prejudice as to further actions in this court," the libelant has appealed. Affirmed.

SHAFTER & SHAFTER, *Proctors for Appellant.* Jacob Rassner and Harvey Goldstein of Counsel. Harvey Goldstein, on the Brief.

HAIGHT, GARDNER, POOR & HAVENS, *Proctors for Appellee.* David P. H. Watson and James M. Estabrook of Counsel.

SWAN, *Circuit Judge*:

This litigation originated in a libel brought by a seaman employed on respondent's vessel to recover under the Jones Act and the general maritime law for alleged injuries sustained by him when he fell through an open hatch. Libelant is an Estonian citizen who signed on at Houston, Texas, for a voyage to terminate in the United States. The respondent is a Swedish corporation, and its vessel sailed under the Swedish flag. The accident happened on March 27, 1953 outside the territorial waters of the United States.

After entering its appearance, the respondent moved the court to decline to retain jurisdiction. The motion was heard upon supporting and opposing affidavits. It was granted in an unreported memorandum decision in which Judge Ryan held the Jones Act not applicable and stated with respect to the claim under the general maritime law:

> "There is no reason for this court's retaining jurisdiction since the extent of the libelant's recovery is determined by Swedish law which can adequately, if not better, be applied by the Swedish consul (*Koziol* v. *Stockholms, supra*), and since there is a convenient forum available to libelant capable of fairly adjudicating his rights."

The decree, entered November 7, 1956, dismissed the libel with prejudice as to further actions in the district court for the southern district of New York.[1]

The appellant makes two contentions: (1) that the district court abused its discretion by failure to retain jurisdiction under the general maritime law; and (2) that the court erred in holding the Jones Act inapplicable. These contentions will be considered in inverse order.

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[1] Timely notice of appeal was filed on December 13, 1956. Why the appeal has taken 15 months to be reached for argument does not appear.

In holding the Jones Act inapplicable Judge Ryan cited as authoritative *Lauritzen* v. *Larsen*, 345 U. S. 571 and *Koziol* v. *The Fylgia*, 2 Cir. 230 F. 2d 651, cert. den. 352 U. S. 827.* We agree that these decisions are conclusive on this issue. Appellant's attempt to distinguish them by reliance on earlier cases in this court which stressed the importance of the place of signing shipping articles is unsound. Although our earlier decisions were not expressly overruled by *Lauritzen*, the opinion in that case makes clear that the Supreme Court considers of relatively little weight the place where the seaman signs on. See *Rankin* v. *Atlantic Maritime Co.* (S. D. N. Y.), 117 F. Supp. 253. Also unsound is the argument that *Lauritzen* is distinguishable because libelant had a "sufficient national interest" to bring him "within the broad purview of the statutory law of the United States" by reason of the fact that between voyages he lived at a seaman's club in New York City. His presence here was never more than transitory; he never entered the United States except as a seaman and could not legally remain ashore more than 29 days between voyages. As said in the *Lauritzen* opinion with respect to Larsen, page 587: "His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another."

The appellant's contention that Judge Ryan abused discretion in failing to retain jurisdiction of the suit is not supportable. His memorandum opinion shows that he rightly inferred that the remedy provided by Swedish law for seamen injured aboard a Swedish ship could be administered by the Swedish Consul in New York. The affidavit of the Swedish Consul General states that "an injured seaman has a full and complete right to compensation from the in-

* This case is cited as *Kozoil* v. *Stockholms* in the opinion of Judge Ryan quoted above.

surance fund * * * " and that "his application therefor may be entertained by any consul or vice consul of Sweden * * * and arrangements there made for the payment of such amount as the seaman may be entitled to under the laws of the Kingdom of Sweden." Thus it is immaterial that Berendson could not, as he asserts, enter Sweden to prosecute a civil action there because he lacks a valid passport from Estonia and cannot obtain one. *The Flatero* v. *Arias*, 4 Cir. 206 F. 2d 267 is plainly distinguishable.[2] We see no basis whatever for holding that the district court abused discretion in declining to retain jurisdiction.

Judgment affirmed.

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[2] See Judge Parker's discussion at page 270.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. THOMAS W. SWAN,
HON. CARROLL C. HINCKS,
HON. LEONARD P. MOORE,
Circuit Judges.

ERICH W. BERENDSON,
Libellant-Appellant,

v.

REDERIAKTIEBOLAGET VOLO,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. 428

ERICH W. BERENDSON,

Petitioner,

against

REDERIAKTIEBOLAGET VOLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT REDERIAKTIEBOLAGET VOLO IN OPPOSITION

JAMES M. ESTABROOK,
DAVID P. H. WATSON,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.

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Supreme Court of the United States

October Term, 1958

No. 428

ERICH W. BERENDSON,

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REDERIAKTIEBOLAGET VOLO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT REDERIAKTIEBOLAGET VOLO IN OPPOSITION

Opinions Below

The memorandum opinion of the United States District Court for the Southern District of New York, dated October 26, 1956 is reported at 149 F. Supp. 140 and is set forth at pages 2a-3a of libellant-appellant's Appendix in the Court of Appeals.*

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is reported at 257 F. 2nd 136 and is set forth on pages 23-26 of the Appendix to the Petition.

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* Pages designated as "a" refer to pages in libellant-appellant's Appendix in the Court of Appeals; and pages designated as "b" refer to pages in respondent's Appendix in the same Court.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

The Statutes Involved

The only United States statute alleged by the petitioner is the Jones Act, 46 U. S. Code § 688, enacted as Section 33 of the Merchant Marine Act of June 5, 1920. Both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit have held that the Jones Act has no applicability to this suit.

The following statutes of the Kingdom of Sweden, which formed the basis for the affidavit of the Consul General of Sweden in New York (17b-19b), are involved:

1. Section 34 of the Royal Ordinance of June 9, 1939. (Covering the hiring abroad of crews of Swedish vessels before Swedish Consuls.)
2. Section 1 of Article 47 of the Royal Ordinance of June 9, 1939. (Providing that all crews aboard Swedish vessels shall serve subject to the Swedish law.)
3. Section 11 of Chapter 11 of the Merchant Seaman Law of June 15, 1922. (Providing that the shipping and discharge of seamen on Swedish vessels shall be subject to Swedish law.)
4. Accident Insurance Act of June 17, 1916. (Making shipowners liable to seamen on Swedish ships for injuries without fault on principles of workmen's compensation and requiring Swedish shipowners to insure their liability to crews of their vessels.)

Questions Presented

1. Whether the Jones Act (46 U. S. Code § 688) is applicable to a suit by an Estonian seaman against the owners of a Swedish vessel based on an injury sustained aboard the vessel while in waters beyond the territorial limits of the United States.

2. Whether the United States Court of Appeals for the Second Circuit was correct in holding that the District Judge had not abused his discretion when he declined to retain jurisdiction of the personal injury suit between a non-resident alien seaman of Estonian nationality and the Swedish owner of the Swedish vessel aboard which the seaman alleges he was injured on the high seas.

Statement

The facts upon which the District Court based its memorandum decision and the facts before the United States Court of Appeals for the Second Circuit as well as those presently before this Court are contained in the libel, in the affidavits filed in support of respondent's motion in the District Court and the affidavits filed in the District Court by libelant and his proctor in opposition to that motion.

At the time of the matters alleged in the libel petitioner was an Estonian citizen (17b) and a member of the crew of the Swedish vessel m/v Dalhem (2b), a vessel owned by the Swedish respondent (1b).

Petitioner signed articles in Houston, Texas, in October, 1952, to serve aboard m/v Dalhem as a member of the crew (26b, 29b). On or about March 27, 1953, while m/v Dalhem was outside the territorial waters of the United States and off the Northern Coast of Cuba (8b, 14b), libelant was injured (2b). One hour after the injury the vessel arrived at the port of Nuevitas, Cuba, and libelant

was placed ashore for hospital and medical treatment in Havana, Cuba (9b). Hospital and medical bills were all paid by respondent.

On June 24, 1953 petitioner rejoined the vessel in Havana and proceeded to Sweden aboard her (9b, 26b). While in Sweden petitioner received further medical treatment and was declared fit for duty by a Swedish physician on August 10, 1953 (9b, 26b). On that same day he rejoined m/v Dalhem as a member of the crew and remained aboard that vessel sailing in various international waters until he deserted the vessel in Great Britain on February 10, 1954 (9b, 27b). According to petitioner's affidavit in opposition to the motion in the District Court he returned by ship to the United States in October, 1955, after serving on several other vessels (27b, 29b).

In the libel, libelant asserted causes of action both under the Jones Act (46 U. S. Code § 688) and under the general and admiralty law of the United States (2b).

By notice of motion, dated May 31, 1956, respondent moved for an order of the District Court declining to retain jurisdiction of the cause of action set forth in the libel on the grounds that it was a suit between foreigners arising out of an alleged personal injury occurring on waters outside the territorial limits of the United States (5b-19b).

In the affidavit submitted in support of that motion it was stated that petitioner could not recover under the Jones Act (11b), and it was urged that since the rights of the petitioner were governed by Swedish law, and since petitioner had a remedy available to him through the Swedish Consulate General in New York, the Court should decline jurisdiction of the cause of action in its discretion (12b).

Annexed to respondent's motion was the affidavit of the Consul General of Sweden in New York in which the

Consul General stated that under the Swedish law service aboard a Swedish vessel must be subject to the terms and conditions laid down in the Swedish Merchant Seamen's law and that pursuant to that law a Maritime Declaration was held on board m/v Dalhem in Boston on April 21, 1953, by the Swedish Consul in Boston, consisting of a hearing of all persons who could give information relating to the injury sustained by the libelant (17b-19b).

It was also stated in that affidavit that under the Accident Insurance Act of June 17, 1916, a Swedish shipowner is required to take out insurance in order that compensation may be provided to seamen aboard Swedish vessels for the result of accidents occurring during the course of their employment. The affidavit of the Consul General also stated that a seaman injured aboard a Swedish vessel had a full and complete right to compensation from the insurance fund of a governmental agency or of a private mutual company especially founded for that purpose and authorized to carry out such insurance by the Royal Swedish Government. Finally, the affidavit of the Consul General stated that it was not necessary for a seaman injured aboard a Swedish vessel to return to Sweden in order to procure such compensation, but his application could be entertained by any Consul or Vice-Consul of Sweden and hearings would thereupon be held at the consulate and arrangements made through the consulate for the payment of such amounts as the seamen might be found entitled to under the laws of Sweden.

In ruling upon the motion District Judge Ryan held that the law of the flag of the vessel, the Swedish law, would apply in determining the rights of the parties and that the Jones Act was not applicable (2a). Judge Ryan also held in his memorandum that he could see no reason for the Court to retain jurisdiction, since the extent of the libelant's recovery was to be determined and fixed by Swedish law which could be better applied by the Swedish Consul (3a).

The petitioner appealed to the United States Court of Appeals for the Second Circuit urging first, that Judge Ryan had erred in holding the Jones Act inapplicable and second, that Judge Ryan had abused his discretion in declining to retain jurisdiction of the suit.

In an opinion, dated July 11, 1958, Circuit Judge Swan, writing for an unanimous court, affirmed the judgment of the District Court dismissing the libel, holding that the Jones Act was inapplicable and that the petitioner's contention that the District Judge had abused his discretion was not supportable (pp. 23-26 of Petition).

ARGUMENT

POINT I

The Jones Act does not afford a substantive right to the petitioner against the respondent and does not constitute a basis for retention of jurisdiction by the District Court over the petitioner's suit.

In the Petition, it is argued that the Jones Act, 46 U. S. Code § 688, is applicable to the suit despite the decision of this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), and upon the affirmative authority of a series of cases all of which were decided by the United States Court of Appeals for the Second Circuit prior to this Court's decision in *Lauritzen* v. *Larsen, supra*.

We submit that this Court's decision in *Lauritzen* v. *Larsen, supra*, is controlling and has so altered the criteria for deciding whether the Jones Act applies in a foreign vessel and foreign seaman case that the earlier decisions upon which petitioner relies have been substantially affected.

The earliest case to which reference is made in the Petition is *The Paula*, 91 F. 2d 1001 (2 C. A. 1937), cert. den.

302 U. S. 750 (1937), in which the Court of Appeals affirmed a District Court decree dismissing an action by a German seaman against the owners of a Danish vessel on which he was serving. The German seaman had signed articles in South America and was injured aboard the vessel while it was in a port in Florida. Circuit Judge Swan, who wrote the opinion in the instant matter, held at page 1004 that rights under the Jones Act were not to be extended to this alien seaman since he had signed articles abroad to serve on a foreign vessel.

The United States Court of Appeals for the Second Circuit next considered the problems in *Gambera* v. *Bergoty*, 132 F. 2d 414 (2 C. A. 1942), cert. den. 319 U. S. 742 (1943). In that case the Court held that the Jones Act was to be applied, since the foreign-born libelant had been domiciled in the United States for over 20 years, since the voyage began and ended in the United States, since the place of signon was a United States port and since the injury occurred in United States waters as well. Furthermore, no practical remedy was available to libelant under the law of the flag, since Greece was under enemy occupation.

In *Kyriakos* v. *Goulandris*, 151 F. 2d 132 (2 C. A. 1945), the United States Court of Appeals held that the Jones Act was applicable to a situation in which the alien seaman signed on a foreign vessel in an American port and was injured in an American port as well. Here again, the law of the flag, Greece, was of little assistance because of enemy occupation.

In *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597 (2 C. A. 1950), cert. den. 341 U. S. 915 (1951) *sub. nom. Atlantic Maritime Co. et al.* v. *Rankin*, the alien seaman signed on in a United States port, but was injured on the high seas. Judge Learned Hand, writing for the Court, held that the Jones Act was applicable and stated the general proposition that the Jones Act imposed its terms upon "all owners who sign on crews in an American port" (179 F. 2d 600).

There is no question but that following the *Taylor* v. *Atlantic Maritime Co.* decision the sole criterion being applied to determine the applicability or nonapplicability of the Jones Act was the place of sign-on. This was confirmed by the extremely brief decision of the United States Court of Appeals in disposing of the appeal in *Lauritzen* v. *Larsen*, 196 F. 2d 220 (2 C. A. 1952). Larsen was a Danish seaman who, having signed articles in New York for service aboard a Danish vessel, was injured aboard that vessel while in the port of Havana, Cuba. The District Court ruled that the Jones Act was to be applied. The Court of Appeals affirmed in a three line opinion which did no more than affirm on the basis of the decisions of the same Court in the *Kyriakos* and *Taylor* cases. By that time there was no question at all but that the basis for the decision was the fact that Larsen had signed articles in a United States port. All other matters were irrelevant. This Court, of course, did not agree with that approach, as will be pointed out later.

Before leaving the *Taylor* case, however, it is interesting to note that counsel makes no mention in his Petition of the fact that a later decision in that case was forthcoming on December 8, 1953, *sub nom. Rankin* v. *Atlantic Maritime Co.*, 117 F. Supp. 253 (S. D. N. Y. 1953). After this Court handed down the *Lauritzen* v. *Larsen* opinion on May 25, 1953, counsel for Atlantic Maritime Co. sought and obtained an order of the District Court granting him leave to file a further motion. Counsel for Atlantic Maritime Co. then moved in the District Court seeking a dismissal of the Jones Act phase of the action on the basis of this Court's decision in *Lauritzen* v. *Larsen, supra.* The District Judge then held that the Jones Act cause of action would have to be dismissed. In other words, the final decision as to the applicability of the Jones Act in *Taylor* v. *Atlantic Maritime Co., supra,* holds *against* this petitioner and not in favor of him as the Petition would indicate. We called this same lack of candor as to the final holding of the *Taylor*

case to the attention of the United States Court of Appeals in our brief on behalf of respondent filed in that Court. It will be noted that the opinion of Circuit Judge Swan (p. 25 of the Petition) refers to the final *Rankin* v. *Atlantic Maritime Co.* decision as being against petitioner's contentions. For some reason counsel for petitioner stubbornly chooses not to vary from his earlier position. Perhaps this is due to the fact that the physical format of the Petition presently before this Court is taken for the most part without alteration from the brief which was submitted on behalf of petitioner in the United States Court of Appeals for the Second Circuit. It will be noted that throughout the Petition reference is made to "this Court" while in fact meaning the United States Court of Appeals for the Second Circuit and not the Supreme Court of the United States. The bulk of the Petition has been lifted bodily from the earlier brief without change of words or approach. Nothing new has been presented, and every argument in the Petition has already been rejected by the United States Court of Appeals.

The decision of this Court in *J. Lauritzen* v. *Larson, supra,* is relevant to the instant suit, and under that decision it is apparent that the Jones Act does not apply.

In writing the *Lauritzen* opinion Mr. Justice Jackson considered the seven elements, which he stated were generally conceded to influence choice of law to govern a maritime tort claim. A comparison of these seven factors in the *Larsen* case and in the instant suit discloses no significant variation.

1. The first factor, Place of the Wrongful Act, is on all fours with the facts in the *Lauritzen* case. Neither Larsen nor this petitioner were injured in territorial waters of the United States. The former was injured aboard his vessel in the port of Havana, Cuba. The latter was injured on the high seas just off the coast of Cuba.

2. With respect to the second factor, Law of the Flag, Mr. Justice Jackson held at 345 U. S. 584-6 that the great-

est weight was to be given to the law of the flag and that the law of the flag was to prevail against American law unless "some heavy counter-weight appears." In the *Lauritzen* case the flag of the vessel was Danish and Danish law was held to be applicable. The vessel here involved is a Swedish vessel flying the Swedish flag and registered out of Sweden. The Swedish law should apply.

3. The third factor considered by Mr. Justice Jackson was Allegiance or Domicile of the Injured and it is here, perhaps, that a slight variation between the two cases exists. Both parties in the *Lauritzen* case, the seaman and the shipowner, were Danish. This petitioner is Estonian and the vessel aboard which he was sailing was Swedish. We submit, however, that the Jones Act was not intended by Congress to be applied whenever there appeared to be a diversity of citizenship between the nationality of the seaman and the nationality of the owners of the vessel. It would be ridiculous to hold that absent other factors the Jones Act should be applied to any employer-employee relationship where both were aliens, but were of different nationalities. Reference to Mr. Justice Jackson's comments at 345 U. S. 586-7 on this factor indicates that such a dissimilarity of nationality would have made no difference in his conclusion.

Throughout the Petition petitioner has been characterized as a "permanent alien resident" of the United States, and on the basis of that characterization counsel for petitioner urges that the District Court should have held the Jones Act applicable. We submit that even *if* petitioner were a permanent inhabitant or domiciliary of foreign citizenship, who was injured aboard a foreign vessel on the high seas, that residence factor alone would not require application of the Jones Act and would not outweigh the other factors which cry for application of the law of the flag.

The fact is, however, that the characterization of the petitioner in the Petition is not accurate. In his memoran-

dum opinion of October 26, 1956 District Judge Ryan stated that the petitioner was "an Estonian citizen, living between voyages in New York at a seaman's club" (2a). In his opinion affirming the dismissal Circuit Judge Swan disposed of this argument in the following words (p. 25 of the Petition):

> "Also unsound is the argument that *Lauritzen* is distinguishable because libelant had a 'sufficient national interest' to bring him 'within the broad purview of the statutory law of the United States' by reason of the fact that between voyages he lived at a seaman's club in New York City. His presence here was never more than transitory; he never entered the United States except as a seaman and could not legally remain ashore more than 29 days between voyages."

We submit that the words of Mr. Justice Jackson are directly in point when in referring to the seaman in the *Lauritzen* case, he wrote.

> "His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another" (345 U. S. 587).

Certainly the presence of this petitioner in New York, temporary as it appears to be, creates no such national interest in him or a duty towards him such as to justify the intervention of American law aboard this Swedish vessel.

4. With respect to the fourth item, Allegiance of Defendant Shipowner Mr. Justice Jackson held that Danish law was applicable, since the vessel and the defendant shipowner were both Danish. In the instant suit the respondent is Swedish and the vessel, m/v Dalhem, is a Swedish flag vessel duly registered out of the Kingdom of Sweden as supported by the affidavit of the Consul General of Sweden in New York (17b-19b).

5. The fifth factor considered in the *Lauritzen* case was the Place of Contract. After stating at 345 U. S. 588 that

the place of sign-on in most instances was "fortuitous" and that "a seaman takes his employment, like his fun, where he finds it", Mr. Justice Jackson wrote at page 589:

> "We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort".

The American sign-on in the instant suit should be given no more weight than was the American sign-on in the *Lauritzen* case.

6. The sixth factor considered by this Court was Inaccessibility of Foreign Forum, and here again the facts are similar. In the *Lauritzen* case Mr. Justice Jackson pointed out that a forum was available to Larsen through the Danish Consulate, and that it was not necessary for him to return to Denmark in order to process his claim. In the instant suit the affidavit of the Consul General of Sweden in New York (17b-19b) makes it clear that a return to Sweden is not necessary in order that this petitioner may obtain relief under the pertinent Swedish statutes.

7. The seventh and last factor considered by Justice Jackson was the law of the Forum. This factor was eliminated as non-determinative at 345 U. S. 591 in the following terms:

> "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable."

It is submitted that, based upon the reasons set forth by this Court in *J. Lauritzen* v. *Larsen, supra*, all seven factors considered would call for a conclusion that, as in the *Lauritzen* case, the law of the flag of the vessel must apply.

The authorities cited in the Petition are outdated and no longer valid in that they had been predicated upon the now rejected theory that cardinal importance was to be given to the place of sign-on.

The rulings of the two courts below in the instant matter are consistent with this Court's holding in *Lauritzen* v. *Larsen, supra*, in disposing of the Jones Act cause of action.

POINT II

The District Judge did not abuse his discretion in declining to retain jurisdiction of the libel.

Apparently there is no argument between counsel for petitioner and counsel for respondent with respect to the statement that the question involved is whether the District Court should have retained jurisdiction of the suit, not whether the District Court had jurisdiction originally.

There is no question but that the power to entertain the libel existed in the District Court. We urge, however, that Judge Ryan's decision to decline to retain jurisdiction, arising out of a motion addressed towards that relief, was sound and evidenced no abuse of his judicial discretion.

Since counsel for petitioner cites the case, we assume that he agrees with the holding of this Court in *Canada Malting Co.* v. *Paterson*, 285 U. S. 413 (1932), where Mr. Justice Brandeis wrote as follows at page 421:

> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions of the lower Federal Courts [citations]. The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences [citations], or to claims of personal injury [citations]."

> "Obviously, the proposition that a Court having jurisdiction must exercise it, is not universally true; else the Admiralty Court could never decline jurisdiction on the ground that the litigation is between foreigners."

We also agree with counsel for petitioner when he cites the *Belgenland*, 114 U. S. 355 (1885), for the proposition that, in an admiralty suit between foreigners, the question is not whether jurisdiction exists, but only whether it should or should not be exercised by the District Court.

The question of abuse or non-abuse of judicial discretion in a case such as this hardly lends itself to formula appraisal, and each case must, as a rule, stand on its own facts and on its own merits. For those reasons we feel that the authorities cited in petitioner's brief are distinguishable, since all of them are predicated upon their own peculiar facts, although perhaps decided on the basis of the same general principles.

We urge, however, that the case of *Koziol* v. *The Fyigia*, 230 F. 2d 651 (2 C. A. 1956), cert. den. 352 U. S. 827 (1956), is so closely in point on the facts and on the results that it should be called to the attention of this Court. Koziol was a seaman of Polish nationality who was serving aboard the m/s Fylgia, a Swedish vessel, and who claimed that he had been injured aboard that vessel while on the high seas. He sued in admiralty in the United States District Court for the Southern District of New York as did this petitioner. Respondent in that suit moved for an order of the District Court declining to retain jurisdiction. In an opinion granting the motion, not officially reported, but unofficially reported at 1953 A. M. C. 220, District Judge Clancy held that the rights of Koziol as against the Swedish owners were to be determined under the Swedish law, and that he would decline to retain jurisdiction, since the affidavit submitted in support of the motion included an affidavit from the Swedish Consul in New York stating that

Koziol's claims could be presented through that body. The United States Court of Appeals for the Second Circuit, in an unanimous opinion, affirmed, stating:

> "And there is no ground for holding the Trial Judge in error in his conclusion that, since the Swedish law so directly controls, the libelant's rights would be adequately, if not better adjudicated in Swedish tribunals."

Between the dismissal of the original District Court action referred to above and the affirmance by the Court of Appeals, a second libel had been filed in the Southern District Court on behalf of Koziol. In declining to retain jurisdiction of that second libel District Judge Clancy wrote, as unofficially reported at 1956 A. M. C. 719:

> "Indeed, the fact is established that the libelant has a right under Swedish law which he can assert here."

The affidavit of the Swedish Consulate General in the instant matter (17b-19b) sets forth the provisions of the Swedish law relating to the coverage on a compensation basis to which seamen serving aboard Swedish vessels are entitled. It is respectfully submitted that the Swedish Consulate in New York is fully competent to administer the appropriate provisions of the Swedish law relating to the rights of this petitioner under that law.

An interesting if not astonishing sidelight on this phase of the Petition is that while counsel for petitioner writes in the Petition that the rights and remedies of this petitioner through the Swedish Consulate are fictions and empty promises, the petitioner himself is now actively engaged in filing and presenting his claim through the very Swedish Consulate General about which his counsel makes so many derogatory remarks. Since the decision of the Court of Appeals on July 11, 1958, the petitioner has been in frequent communication with the Consulate, and at this

very moment the Consul General is awaiting receipt of further information from the petitioner relating to petitioner's employment since the injury of March 1953 in order that there may be some substantiation for his claim of disability. We can only suggest that petitioner and his counsel have failed to coordinate their activities. Certainly the actions of the petitioner are not reflective of the arguments of his counsel.

On page 3 of the Petition counsel argues that there is a conflict between the decision of the United States Court of Appeals for the Second Circuit in the instant matter and the decision of the United States Court of Appeals for the Fourth Circuit in *Fletero* v. *Arias*, 206 F. 2d 267 (4 C. A. 1953) cert. den. 346 U. S. 897 (1953). We submit that the case is clearly distinguishable. That case involved a suit in admiralty filed by an Argentinian seaman against an Argentinian vessel and the Argentinian owners. Not only did the injuries occur while the vessel was moored to the dock in Norfolk, Virginia, but libelant was also claiming for unpaid wages and waiting time under 46 U. S. Code § 596. This wage claim statute applies to foreign vessels while they are in United States ports. The constitutionality of that provision as applied to foreign vessels and foreign seamen was supported by the decision of this Court in *Strathearn Steamship Company* v. *Dillon*, 252 U. S. 348 (1919). Since a claim was made under that wage statute the District Court was *required* to retain jurisdiction of at least that cause of action of the libel and in the interest of economy of justice undertook to entertain the claim as well for injuries sustained in United States waters. In the instant matter, of course, no such claim has been made under the wage statutes, and the District Court was not required to retain jurisdiction under any of the allegations contained in the libel. Chief Judge Parker in the *Fletero* case also justified the retention of jurisdiction by the District Judge on the grounds that libelant's injury occurred

while the ship was tied up in Norfolk, that a survey of the vessel had been made in Norfolk, and that the libelant was hospitalized in Norfolk, thereby making the medical proof immediately available as well. None of these factors are present in the instant Petition. There is no connection whatsoever between the matters set forth in this libel and the fact that suit was instituted in the District Court in New York. The injury was sustained on the high seas. The libelant was treated in Havana, Cuba, and in Sweden. None of the witnesses are located in New York. Most important, however, is the fact that the wage claim is what prompted the Court in the *Fletero* case to retain jurisdiction. As stated by Chief Judge Parker at 206 F. 2d 271:

> "The fact that the court must assume jurisdiction of the claim arising under the statutes of the United States is a circumstance which it may properly consider in deciding whether it will assume jurisdiction of the claim for damages so that the libelant may be awarded complete relief against the vessel in one suit".

There is no conflict at all between the instant matter and *Fletero* v. *Arias, supra.* The conclusion in the latter case is different because the claims and the facts were different.

Other authorities cited in the Petition on the question of discretionary jurisdiction and the abuse thereof are clearly distinguishable as well.

In *Gonzales* v. *D/S Dania A/S*, 108 F. Supp. 908 (S. D. N. Y. 1952), the District Judge exercised his judicial discretion and retained jurisdiction of the suit between the Spanish seaman and the Danish vessel only because there had been no showing of the existence of any remedies under the laws of Denmark and no showing that any relief could be had through the local Danish Consulate General.

Heredia v. *Davies*, 12 F. 2d 500 (4 C. A. 1926), involved an appeal by the shipowner after a trial on the merits. The shipowner claimed that the District Court should not have assumed or retained jurisdiction of the causes of action. Judge Parker affirmed the assumption of jurisdiction by the District Court and pointed out that the injuries had been sustained aboard the vessel while she was "at the dock in New York City" and then ruled, rightly or wrongly, that the District Judge was correct in holding, that the rights of the parties were to be determined by the law of the United States as the *lex loci delicti* (12 F. 2d 501). This same argument could not, of course, be used in the instant suit since this petitioner was injured on the high seas and the law of Sweden, the law of the flag, and not the law of the United States would be the *lex loci delicti*.

Barkas v. *s/s Vassilis*, 126 F. Supp. 532 (S. D. N. Y. 1955), referred to on page 16 of the Petition involved a libel by members of the crew of a Panamanian vessel against another Panamanian vessel for salvage services rendered. In rejecting a motion to have the Court decline to retain jurisdiction of the suit the District Judge held that a salvage claim was one arising under the law of nations and the District Court would take jurisdiction unless special grounds were shown why it should not. This petitioner has no cause of action under the law of nations and none is urged in the libel. Rather his cause of action falls within the Swedish law, and if this District Court had retained jurisdiction of the suit it would have found itself immersed in the substantive provisions of Swedish law.

Nor is *Cruz* v. *Herkna et al.*, 125 F. Supp. 288 (S. D. N. Y. 1954) in point. District Judge Conger there held that he would retain jurisdiction under the general maritime law, since it was apparent that the Portuguese libelant would have to proceed to Honduras in order to present his claim. Judge Conger rightly felt that this would be

an undue hardship, especially since the Portuguese libelant was about to be deported to Portugal. No such factors are present in the instant Petition, since it has been demonstrated that this petitioner can proceed to press his claims under the Swedish law without having to proceed to Sweden. The fact that such a procedure is presently being followed by the petitioner himself through the Swedish Consulate General in New York is perhaps the best proof of that.

We submit that there is not the slightest evidence of abuse of discretion on the part of District Judge Ryan when he held that:

> "There is no reason for this Court's retaining jurisdiction since the extent of libelant's recovery is determined and fixed by Swedish law which can adequately if not better be applied by the Swedish Consul (*Koziol* v. *Stockholms, supra*), and since there is a convenient forum available to libelant capable of fairly adjudicating his rights."

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

James M. Estabrook,
David P. H. Watson,
Counsel for Respondent,
80 Broad Street,
New York 4, N. Y.